

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.  
W. A. DREW EDMONDSON, in his capacity as  
ATTORNEY GENERAL OF THE STATE OF  
OKLAHOMA and OKLAHOMA SECRETARY  
OF THE ENVIRONMENT C. MILES TOLBERT,  
in his capacity as the TRUSTEE FOR NATURAL  
RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiffs,

vs.

TYSON FOODS, INC., TYSON POULTRY, INC.,  
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,  
AVIAGEN, INC., CAL-MAINE FOODS, INC.,  
CAL-MAINE FARMS, INC., CARGILL, INC.,  
CARGILL TURKEY PRODUCTION, LLC,  
GEORGE'S, INC., GEORGE'S FARMS, INC.,  
PETERSON FARMS, INC., SIMMONS FOODS,  
INC., and WILLOW BROOK FOODS, INC.,

Defendants.

05-CV-0329 JOE-TCK  
JURY TRIAL DEMANDED

**MOTION FOR PROTECTIVE ORDER**

COME NOW Defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; Cargill Turkey Production, LLC, Cargill, Inc. and Willow Brook Foods, Inc. and submit the following *Motion for a Protective Order*.

I. INTRODUCTION

Plaintiff has issued at least twenty-five (25) Rule 45 subpoenas to various non-parties to the present action requesting access to real property for the purpose of inspecting and conducting

sampling on such properties (the “Subject Properties”).<sup>1</sup> Several of the recipients of Plaintiff’s subpoenas have served objections to the subpoenas and in some instances moved to have those subpoenas quashed. *See* Objections and Motion to Quash filed May 1, 2006 on behalf of various non-parties (Dkt. No. 493) and Tyson Chicken Inc.’s Objection to and Motion to Quash Subpoena filed May 3, 2006 (Dkt. No. 512). Under Rule 45 the filing of such objections bars the inspection and sampling of the Subject Properties “except pursuant to an order of the court by which the subpoena was issued.” FED. R. CIV. P. 45(c)(2)(B). This Court has not yet ruled upon these objections.

The purpose of the present Motion is to set forth the concerns and objections of the Poultry Defendants with respect to the form and service of the these subpoenas and to request relief from this Court necessary to prevent the Poultry Defendants from being prejudiced, unduly burdened, unnecessarily injured or unfairly surprised by the Plaintiff’s proposed inspections and sampling events.

Through its sampling campaign, Plaintiff apparently hopes to gather or develop sampling and laboratory data to support (or attempt to support) its claims in this action against the Poultry Defendants. Environmental sampling data is inherently unique in that it depicts conditions present at a specific time in samples taken from specific locations. The results from

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<sup>1</sup> Upon information and belief, Plaintiff has issued inspection and sampling subpoenas to the following individuals and entities: Priscilla McGarrah; Larry McGarrah; Thomas D. Reed; Ren Butler and George Butler; Ruth E. Reed; Robert V. Schwabe II; Joel J. Reed and Rhonda Reed; Jim L. Pigeon and Michele R. Pigeon, Franklin A. Glenn and Kenneth D. Glenn and Sondra D. Glenn; Kenneth D. Glenn and Franklin Glenn; Kenneth D. Glenn, Trustee of the Kenneth Glenn Trust; Roger D. Collins; Hudson Farms, Inc.; Caleb Reed; Cory Reed; Juana Loftin; Raymond C. Anderson and Shannon Anderson; Julie Anderson Chancellor, Trustee of Julie Anderson Chancellor Revocable Trust; Tony Ray Anderson and Carla Renay Anderson; David R. Wofford and Robin L. Wofford; Steven Butler d/b/a Green Country Farms; W.A. [or Bev] Saunders; Bill R. Anderson and Tony R. Anderson; Bill Ray Anderson and Betty Faye Anderson; and Jada Lo Vang. Copies of the subpoenas directed to these individuals are attached hereto as Collective Exhibit 1. Plaintiff’s failure to provide notice of the issuance of its Rule 45 subpoenas, as discussed hereinafter, prevents the Poultry Defendants from confidently stating that these are all of the subpoenas issued as of this date by Plaintiff. These, however, are the ones that the Poultry Defendants are aware of as of the filing of this Motion.

environmental sampling and the reliability of environmental sampling data are heavily influenced by the manner in which samples are collected, preserved, handled and the methods of analysis applied to these data. Given these facts, it is imperative that the Poultry Defendants be afforded their rights to adequate notice of and full participation in any inspections or sampling events which this Court may authorize the Plaintiff to perform these Subject Properties.<sup>2</sup> The Poultry Defendants also have grave biosecurity and bird health concerns in connection with the Plaintiff's sampling campaign.

The Poultry Defendants have conferred in good faith with the Plaintiff in an effort to resolve their concerns about Plaintiff's sampling campaign. Unfortunately, while Plaintiff has agreed to address some of the Poultry Defendants' concerns regarding their sampling campaign they have refused to address others.<sup>3</sup> Accordingly, the Poultry Defendants have no choice but to request entry of an order pursuant to Federal Rule 26(c) from this Court protecting their interests in these matters.

## II. ARGUMENT AND LEGAL AUTHORITY

The subpoenas at issue in this Motion and the Plaintiff's proposed sampling plan are clearly oppressive and unduly burdensome, not just with respect to the non-party recipients but also with respect to the Poultry Defendants. Plaintiff failed to provide timely notice to the Poultry Defendants of the issuance of these subpoenas. The subpoenas are premature, overly broad and seek to bestow upon Plaintiff the unfettered right to conduct sampling whenever it chooses with little or no notice to the Poultry Defendants and certainly without regard to the

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<sup>2</sup> By requesting the entry of a protective order placing conditions upon the inspection and sampling which the Plaintiff seeks to accomplish pursuant to their subpoenas, the Poultry Defendants are in no way suggesting that the Plaintiff is entitled to conduct such inspections or sampling; nor are the Poultry Defendants asking this Court to overrule the objections and motions to quash interposed by affected landowners. Those objections and motions present serious issues which may indeed warrant the quashing of Plaintiff's subpoenas.

<sup>3</sup> The written communications between the parties on these subjects are attached hereto as Collective Exhibit 2. Counsel for Plaintiff and counsel for the Poultry Defendants also held a meeting in Tulsa on April 26, 2006 to discuss the Poultry Defendants' concerns with Plaintiff's proposed sampling campaign.

ability of the Poultry Defendants to attend, monitor and, if necessary, participate in the sampling events. Furthermore, the intervention of this Court is necessary to protect the Poultry Defendants from the very real possibility of substantial harm to their property interests from Plaintiff's refusal to adopt appropriate biosecurity protocols as part of their proposed sampling of properties on which valuable flocks of birds owned by the Poultry Defendants are present.

A. Plaintiff Did Not Provide Timely Notice of the Rule 45 Subpoenas.

As a threshold matter, the Court should note Plaintiff's failure to provide timely notice to the Poultry Defendants of the issuance of these subpoenas. As the Federal Rules of Civil Procedure require, Plaintiff should be instructed by the Court to provide notice of any future Rule 45 subpoenas to the parties to the action *prior* to the service of these subpoenas upon non-parties. The subpoenas at issue were issued by Plaintiff's counsel on April 13, 2006. The Poultry Defendants were not served by Plaintiff with copies of those subpoenas until April 24, 2006 and then only after inquiring of Plaintiff's counsel as to why non-parties were apparently being served with subpoenas that none of the defense counsel had seen. Counsel for the Plaintiff's explanation was that they were not required to provide notice to the parties to the action of the issuance of Rule 45 subpoenas until *after those subpoenas* had been served on the non-parties. Plaintiff is plainly wrong on this point.

Federal Rule of Civil Procedure 45 provides that "[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)." Fed. R. Civ. P. 45(b)(1). The application of Rule 45's "prior notice" provision in the context of subpoenas requesting environmental sampling was discussed by this Court in *JB and JEB v. ASARCO, Inc.*, Case No. 03-CV-498 H(C). In that case this Court found that the issuance and service of such subpoenas by a plaintiff without providing

prior notice of the subpoenas to the defendants in the case was improper. *Id.* at 3. There, the Court stated that “Rule 45 does not specify what constitutes timely notice; however, the Tenth Circuit Court of Appeals has interpreted Rule 45(b)(1) as requiring notice *before* a subpoena is served.” Jan. 7, 2005 Order, at 3 (citing *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d 1163, 1173 (10<sup>th</sup> Cir. 2003)).

The purpose of Rule 45’s notice requirement is to “afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things.” *Id.* (citing Advisory Committee Note to Rule 45). Here, Plaintiff did not serve the Poultry Defendants with a copy of any of its Rule 45 subpoenas prior to serving the subpoenas on the non-parties. Such notice by Plaintiff was not provided until well after those subpoenas had been served on the non-parties. Clearly, Plaintiff has not complied with the prior notice provisions of Rule 45(b)(1). Plaintiff’s failure to provide notice to the Poultry Defendants of the Rule 45 subpoenas has imposed a significant burden upon the Poultry Defendants with respect to their ability to timely object to the subpoenas. Poultry Defendants ask that this Court issue an order instructing Plaintiff to provide prior notice to the Poultry Defendants of any subsequently issued Rule 45 subpoenas in accordance Fed. R. Civ. P. 45(b)(1).

B. Plaintiff’s Subpoenas Do Not Meet the Specificity Requirements of Rule 45 and Rule 34, and Are Oppressive and Unduly Burdensome.

The subpoenas at issue seek to bestow upon Plaintiff and its experts and attorneys the unfettered discretion to repeatedly access and sample unspecified fields at unspecified times over a two-month period. Plaintiff has also refused to provide adequate notice to the Poultry Defendants regarding the manner in which they intend to conduct the sampling and the related laboratory analysis of the samples to be taken pursuant to their subpoenas. Given that the Plaintiff intends to use the evidence developed from this “court-ordered” sampling campaign to

try to establish liability on the part of the Poultry Defendants in this case, the sampling events and related analytical testing should be conducted openly with full disclosure and notice to the Poultry Defendants and the relevant landowner/farmer. The vagueness of the subpoenas with respect to the time, place and manner of sampling and Plaintiff's refusal to remedy these defects is sufficiently prejudicial, oppressive and unduly burdensome to the Poultry Defendants to warrant the entry of a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.<sup>4</sup>

Rule 45 states that "[e]very subpoena shall command each person to whom it is directed . . . to permit inspection of premises, at a **time and place therein specified.**" FED. R. CIV. P. 45(a)(1)(C) (emphasis added). Rule 34's provisions regarding inspection requests impose a similar obligation by requiring that the requesting party describe with reasonable particularity the items to be inspected and "specify a reasonable time, place, and manner of making the inspection and performing the related acts." FED. R. CIV. P. 34(b).<sup>5</sup> Plaintiff's subpoenas are deficient under both Rules 34 and 45.

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<sup>4</sup> Litigants are not entitled to use subpoenas or other discovery devices to oppress or to impose undue burdens upon other parties to the litigation. Fed. R. Civ. P. 26(c). When a court determines that oppression or an undue burden will result from discovery, it may place certain conditions on discovery, such as allowing discovery to be had "only on specified terms and conditions, including a designation of the time or place" or allowing discovery to be made "only by a method of discovery other than that selected by the party seeking discovery." Fed.R.Civ.P. 26(c)(2) & (3). In making such determinations, the Court must consider the burden imposed if a protective order is not granted as compared with the burden imposed upon the requesting party if a protective order imposing conditions is granted." *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 669 F.2d 620, 623 (10<sup>th</sup> Cir. 1982) (citing *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8<sup>th</sup> Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974)).

<sup>5</sup> This Court's decision on the present motion also requires consultation of Rule 34's provisions relating to the inspection of property. It is well-settled that "the scope of discovery under a subpoena is the same as the scope of discovery under Rules 26(b) and 34." *Goodyear Tire v. Kirk's Tire, Inc.*, 211 F.R.D. 658, 662 (Kan. 2003) (citing Advisory Committee Note to the 1970 Amendment of Rule 45(d)(1) and 9A Wright & Miller, *Federal Practice and Procedure*, § 2459 (2d ed. 1995)); *see also In re Cusumano*, 162 F.3d 708, 714 (1<sup>st</sup> Cir. 1998) (relying on 9A Wright & Miller, *Federal Practice and Procedure*, § 2452 (2d ed. 1992)). Thus, Federal Rule of Civil Procedure 34 and cases interpreting that rule are persuasive in this Court's determination of whether to place limitations upon the requested inspection and sampling of the Subject Properties.

First, the subpoenas do not specifically identify the *place* where the proposed inspection or sampling would occur. Many of the Subject Properties consisted of large parcels of lands comprised of 80, 100 and even 200 acres. (*See* Collective Exhibit 1). The sampling requests attached as exhibits to the subpoenas suggests that the bulk of the inspection and sampling would occur on “waste applied fields.” However, none of the subpoenas actually identify the location of such fields. Furthermore, it is evident from that objection and motion to quash already filed by at least one of the property owners at issue that Plaintiff has no knowledge of the location of these “waste applied fields” and that some of these properties may not have ever had litter applied anywhere on them. *See* Tyson Chicken Inc.’s Objection to and Motion to Quash Subpoena filed May 3, 2006 (Dkt. No. 512).

Plaintiff’s request for a roving commission from this Court to traverse large tracts of property searching for “waste applied fields” clearly does not meet the Rule 45’s requirement to specifically identify the place where the proposed sampling and inspection is to occur. In fact, this very issue was raised during the hearing conducted in the underlying action on March 23, 2006 when Magistrate Judge Sam Joyner inquired of Plaintiff’s counsel as to how they planned to identify those fields which had actually received litter for the purpose of their proposed sampling. (*See* Ex. 3, Transcript of March 23, 2006 Hearing, p. 44.) In response, Plaintiff’s counsel acknowledged their lack of specific knowledge at that time with respect to such matters but represented to the Court that they could verify such facts (presumably before issuing subpoenas) either through visual observations or through communications with the defendants to this lawsuit. *Id.* Following that exchange it was the belief (obviously mistaken belief) of the Poultry Defendants that the subpoenas to be issued by Plaintiff would actually identify the specific “waste applied fields” or other areas to be sampled. Plaintiff’s subpoenas fail to make



any such specific identification of the place of the proposed sampling sites. In that regard, those subpoenas fail to meet the specificity requirements of Rules 34 and 45.<sup>6</sup>

Second, the subpoena fails to provide any specificity with respect to the “*manner* of making the inspection and *performing the related acts*.” FED. R. CIV. P. 34(b). While Plaintiff has generically described the type of samples they intend to collect (i.e. soil, groundwater, surface water and litter), they have refused to specify the “related acts” they intend to perform on these samples. For example, with respect to surface water run-off samples and the groundwater samples, Plaintiff has recently advised the Poultry Defendants that “decisions concerning how and what to test for and how to preserve the water for testing are our attorney work product and the decisions are therefore privileged.” (*See* Ex. 2, May 2, 2006 correspondence from Mr. Bullock to Mr. McDaniel, p. 2.<sup>7</sup>) Plaintiff has presented no justification for its apparent desire to secretly conduct testing of samples gathered under the auspices of the discovery provisions of the Federal Rules of Civil Procedure. The Poultry Defendants need to know what constituents the Plaintiff is testing for so that they can properly evaluate Plaintiff’s proposed sampling collection and preservation methods and make arrangements to obtain and test proper

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<sup>6</sup> To the extent that Plaintiff intends to identify poultry litter application areas through on-site interrogations of landowners such a practice is clearly not permitted pursuant to a Rule 34 or Rule 45 inspection. In *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4<sup>th</sup> Cir. 1978), the Fourth Circuit reversed a district court order granting plaintiffs’ motion for Rule 34 discovery in the form of the inspection of a plant, along with inquiry of defendant’s employees. Defendants argued that the “interrogation of the employees, conducted informally, would also be, . . . tantamount to a roving deposition, taken without notice, throughout the plants, of persons who were not sworn and whose testimony was not recorded, and without any right by the defendant to make any objection to the questions asked.” 588 F.2d at 907. The court stated that “[a]lthough the Federal Rules do not prescribe an order of preference for discovery techniques, one method cannot arbitrarily be demanded over another simply because it is less burdensome to the moving party.” *Id.* at 910. The court indicated that it would be appropriate for plaintiff to take formal depositions of employees prior to inspecting the defendant’s plant, stating “[d]epositions do much to identify the items of discovery and to establish the rights of the parties under Rule 34.” *Id.*

<sup>7</sup> With respect to soil and litter samples, Plaintiff finally provided on May 2<sup>nd</sup> a list of the constituents for which their experts initially recommended testing. The Poultry Defendants are still reviewing the “work plan” attached to Mr. Bullock’s May 2<sup>nd</sup> letter but note for the Court that Plaintiff seeks to “reserve the right at any time to change, without notice to you [Poultry Defendants], what we test the samples for and the method or manner in which we handle our part of the samples . . . .” *See* Ex. 2, May 2, 2006 correspondence from Mr. Bullock to Mr. McDaniel.



field split samples in order to evaluate and confirm and perhaps discredit the results that Plaintiff may report from its sampling campaign.<sup>8</sup> Allowing the Plaintiff to conduct secret tests and to spring them on the Court and Defendants later in the case will only result in undue delay and unnecessary expense in the adjudication of this case as the Defendants will at that point be required to attempt a re-creation of Plaintiff's tests (an attempt which will be frustrated by the inevitable change in conditions that occur in the environment over time).

Finally, and perhaps most significantly, Plaintiff's subpoenas are defective because they do not identify with any degree of specificity the dates and times on which Plaintiff seeks to inspect or sample the Subject Properties. Although the face of the subpoenas indicate that the inspections would occur on "May 5, 2006 @ 9:00 a.m.," a review of the "sampling requests" attached as exhibits to the subpoenas reveal that this is merely the date and time of the *first of many different sampling events* which Plaintiff seeks to compel pursuant to these subpoenas. The sampling requests attached state that rainfall runoff samples "will be conducted *from time to time through June 30, 2006 as rainfall events occur.*" Plaintiff also apparently intends to repeatedly access these properties in order to collect "grab samples" from groundwater monitoring wells they intend to construct on the Subject Properties. Here again, no schedule for this access and collection is provided by Plaintiff's subpoenas. Plaintiff, under the current subpoenas, seeks the right to access the Subject Properties at any time of the day or night, as many times as it wishes, for a period of at least two months. Clearly, such access would impose a significant burden upon the Poultry Defendants to be present to monitor and document these

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<sup>8</sup> Plaintiff has refused to agree to provide the Poultry Defendants with field split samples for testing and instead have demanded that the Poultry Defendants accept composited samples prepared by Plaintiff's laboratory. (See Ex. 2, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel.) The Poultry Defendants believe that the standard sampling approach of gathering field split samples is necessary to ensure that the Poultry Defendants receive adequate samples before the Plaintiff's consultants take custody of them in order to properly evaluate and potentially refute the results to be reported by Plaintiff.

events and to take or accept any field split samples. As the parties whose liability the Plaintiff seeks to prove through this sampling, the Poultry Defendants have a right to reasonable advanced notice that the Subject Property will be accessed and sampled *at a particular time*. See FED. R. CIV. P. 45(a)(1)(C) and 34(b). Plaintiff's subpoenas fail to provide such notice.

The request for a continuing right to access the Subject Property at unspecified times presents practical problems which could create substantial prejudice to the Poultry Defendants' ability to defend against the data Plaintiff's experts hope to generate in these sampling events. Poultry Defendants are entitled to have their experts and attorneys present to observe and properly documents these sampling events. In the absence of properly scheduled sampling events, the Poultry Defendants may be unable to mobilize their attorneys and experts to observe the periodic sampling undertaken by Plaintiff. Absent the reasonable ability for the Poultry Defendants to fully participate, observe and obtain contemporaneous split samples from the materials collected by Plaintiff, the sampling should not be permitted.

Because the subpoenas do not specify the location, time, frequency, or manner of the sampling and related acts to be performed, they are defective under Rules 34 and 45. If sampling is to occur, the Plaintiff should be ordered to correct these defects and to issue and serve modified subpoenas in full compliance with Rules 34 and 45 before any inspections or sampling events.

Plaintiff has prematurely issued its Rule 45 subpoenas. Plaintiff has not deposed any of the non-parties to whom a Rule 45 subpoena was issued to determine which fields, if any, on the Subject Properties have had litter applied to them. It is inappropriate for Plaintiff to informally depose the non-parties at the time of inspection to determine which fields should be sampled. Pursuant to *Belcher*, this Court should require Plaintiff to conduct formal depositions of the non-

parties prior to permitting Plaintiff to enter the Subject Properties for the purpose of inspection and sampling of “waste applied fields.”

C. The Poultry Defendants are Entitled to Entry of Protective Order Requiring that Plaintiff's Comply with Appropriate Biosecurity Protocols During any Inspections or Sampling Events.

Biosecurity protocols are of the utmost importance to the Poultry Defendants and are a regular part of their everyday business routine. Access to the Subject Properties without following proper biosecurity protocols, particularly by a person who has recently been on other poultry farms, presents a very real risk of the transmission of bird diseases which could seriously harm the health of the Poultry Defendants' then-present or future-placed flocks. Matters of biosecurity are critical and must be addressed given the much-discussed risks presented by diseases such as Avian Influenza (AI), Infectious Laryngotracheitis (LT) and Exotic Newcastle Disease (END). Furthermore, a bird disease outbreak on any of these farms could result in the condemnation of any infected flocks thus resulting in significant monetary damages to the Poultry Defendants.

The Poultry Defendants have made several good faith attempts to address their biosecurity concerns through conversations and written communications with Plaintiff. Although Plaintiff has expressed a willingness to implement certain biosecurity protocols which it believes should be adequate to protect against a bird disease outbreak, it has thus far refused to adhere to all of the biosecurity protocols required under some of the Poultry Defendant's standing biosecurity policies. One example of Plaintiff's refusal to incorporate the 72 hour waiting period currently applicable to farms under contract with Tyson. Because farms in the IRW are currently under a LT warning, Tyson's biosecurity policies prohibit the entry of farms under contract with Tyson by person who have been on any other poultry farm within the

previous 72 hours. (True and correct copies of the written biosecurity policies for Separate Defendants Tyson and Cobb-Vantress are attached hereto as Collective Exhibit 4.)<sup>9</sup> Plaintiff's proposed biosecurity protocols do not incorporate this 72 hour rule and instead seek to limit the waiting period between farm visits to 48 hours. (See Ex. 2, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel.) Plaintiff's proposal presents unacceptable and unnecessary risks of a bird disease outbreak.

Accordingly, the Poultry Defendants request the entry of a protective order requiring Plaintiff and its lawyers and experts to strictly adhere to all written biosecurity policies and protocols of the Poultry Defendants as set forth in Exhibits 2 and 4 *in addition to* those biosecurity policies already proposed by Plaintiff in Mr. Bullock's May 2, 2006 letter. See Ex. 2.<sup>10</sup>

D. The Court Should Require Plaintiff to Post a Bond Sufficient to Indemnify the Poultry Defendants Against Losses that May be Caused by Plaintiff's Sampling Activities.

In light of the significant biosecurity risks posed by Plaintiff's proposed inspection and sampling of poultry farms as outlined above, the Poultry Defendants request that Plaintiff be required to post a bond in an amount sufficient to indemnify the Poultry Defendants for any damages caused to their poultry flocks by Plaintiff's inspection and sampling. This Court clearly has the discretion to require such a bond and there is precedent in Oklahoma for imposing a bond

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<sup>9</sup> The LT warning in the IRW triggers the "Yellow Stage" protocols described in the Tyson and Cobb-Vantress biosecurity protocols. See Ex. 4. Plaintiff's recent offer to try to schedule sampling for time periods immediately after flocks are removed from these farms for slaughter, while gracious, does not remedy the Poultry Defendant's biosecurity concerns. LT, the disease of most concern at present, does not require physical contact with poultry for transmission. LT can also be transferred through contact with manure, feather and bedding if those items are contacted by a person in one poultry house and then inadvertently tracked into a subsequent poultry house.

<sup>10</sup> Poultry Defendants' biosecurity protocols are not static. In the normal course of business, biosecurity protocols are revised from time to time to address immediate circumstances. The Poultry Defendants cannot control these circumstances nor accurately predict when it may be necessary to impose more stringent biosecurity protocols. Plaintiff should be required to adhere to the most stringent biosecurity protocols or policies in place at the time of any entry onto a farm where poultry is located.

requirement in connection with sampling and inspection requests. In *Williams v. Continental Oil Co.*, the United States District Court for the Western District of Oklahoma imposed a bond requirement as a condition to a party's request to conduct a subsurface directional survey of another party's oil well. 14 F.R.D. 58 (W.D. Okla. 1953). There, the court stated:

The cases uniformly agree that where a survey is ordered the complete risk and hazard, if any, must be borne by the plaintiff; the defendant cannot be submitted to possible loss. Without exception the plaintiff must post a bond sufficient to hold the defendant harmless.

*Id.* at 66. The importance of providing security for potential damage caused by proposed testing was also discussed by the court in *Micro Chemical v. Lextron, Inc.*. In that case, the court took into consideration in its denial of Micro Chemical's request to alter the piece of equipment to be tested the fact that "Micro Chemical has neither made nor offered any provision for security in the event of damage to the machine or other loss which may be suffered by Lextron if the alteration of the machine were ordered." *Micro Chemical*, 193 F.R.D. 667, 669 (D. Colo. 2000).

In meeting with counsel for the Defendants, counsel for Plaintiff have stated that the Poultry Companies' only remedy for any damage Plaintiff may cause would be to file a new lawsuit against the State pursuant to Oklahoma's Governmental Tort Claims Act. As the above-cited authorities make clear, a defendant is not required to initiate new litigation to protect itself from damage caused by the plaintiff during discovery. Clearly, this Court has the power to ensure that Plaintiff takes responsibility for all damages that might be caused by its sampling. Thus, this Court should require Plaintiff to post a bond prior to the commencement of sampling in an amount sufficient to cover any foreseeable damages that may be inflicted upon the Poultry Defendant's flocks as a result of the proposed inspection and sampling.

### III. CONCLUSION

Plaintiff's Rule 45 subpoenas are oppressive and impose substantial and undue burdens upon the Poultry Defendants. Further, the burden that would be imposed upon Plaintiff by the granting of the requested protective order is plainly outweighed by the burdens and risks that the Poultry Defendants will bear if no protective order is granted. Thus, the Poultry Defendants respectfully request that the Court enter an appropriate protective order pursuant to Fed. R. Civ. P. 26(c) with respect to Plaintiff's proposed inspection and sampling of the Subject Properties.

Respectfully submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

Jo Nan Allen  
Frederick C. Baker  
Tim K. Baker  
Douglas L. Boyd  
Vicki Bronson  
Paula M. Buchwald  
Louis W. Bullock  
Lloyd E. Cole, Jr.  
Angela D. Cotner  
W. A. Drew Edmondson  
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Thomas J. Grever  
Jennifer S. Griffin  
John T. Hammons  
Jean Burnett  
Michael T. Hembree  
Theresa Noble Hill  
Philip D. Hixon  
Mark D. Hopson  
Kelly S. Hunter Burch  
Jean Burnett  
Stephen L. Jantzen  
Mackenzie Lea Hamilton Jessie  
Bruce Jones  
Jay T. Jorgensen  
Raymond T. Lay  
Nicole M. Longwell  
Linda C. Martin

A. Scott McDaniel  
Robert Park Medearis, Jr.  
James Randall Miller  
Robert A. Nance  
John Stephen Neas  
George W. Owens  
David Phillip Page  
Marcus N. Ratcliff  
Robert P. Redemann  
M. David Riggs  
Randall E. Rose  
Patrick Michael Ryan  
Robert E. Sanders  
David Charles Senger  
William F. Smith  
Colin H. Tucker  
John H. Tucker  
R. Pope Van Cleef, Jr.  
Kenneth E. Wagner  
David A. Walls  
Elizabeth C. Ward  
Sharon K. Weaver  
Timothy K. Webster  
Gary V. Weeks  
Adam Scott Weintraub  
Terry W. West  
Dale Kenyon Williams, Jr.  
E. Stephen Williams  
Douglas Allen Wilson  
J. Ron Wright  
Lawrence W. Zeringue

and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert Secretary of the Environment State of Oklahoma 3800 N. Classen Oklahoma City, OK 73118 <b>PLAINTIFF</b>	William H. Narwold MOTLEY RICE LLC 20 Church Street 17 <sup>th</sup> Floor Hartford, CT 06103 <b>ATTORNEYS FOR PLAINTIFF</b>
Monte W. Strout 209 W. Keetoowah Tahlequah, OK 74464 <b>ATTORNEY FOR CLAIRE WELLS, LOUISE SQUYRES, THIRD-PARTY DEFENDANTS</b>	Robin Wofford Rt. 2, Box 370 Watts, OK 74964 <b>PRO SE, THIRD PARTY DEFENDANT</b>
James R. Lamb D. Jean Lamb STRAYHORN LANDING Rt. 1, Box 253 Gore, OK 74435 <b>PRO SE, THIRD PARTY DEFENDANTS</b>	Gordon and Susann Clinton 23605 S. Goodnight Lane Welling, OK 74471 <b>THIRD PARTY DEFENDANT</b>
Kenneth and Jane Spencer James C. Geiger Individually and dba Spencer Ridge Resort Route 1, Box 222 Kansas, OK 74347 <b>PRO SE, THIRD PARTY DEFENDANTS</b>	Ancil Maggard c/o Leila Kelly 2615 Stagecoach Dr. Fayetteville, AR 72703 <b>THIRD PARTY DEFENDANT</b>
C. Craig Heffington 20144 W. Sixshooter Rd. Cookson, OK 74427 <b>PRO SE, SIX SHOOTER RESORT AND MARINA, INC., THIRD-PARTY DEFENDANT</b>	Richard E. Parker Donna S. Parker BURNT CABIN MARINA & RESORT, LLC 34996 S. 502 Road Park Hill, OK 74451 <b>PRO SE, THIRD PARTY DEFENDANT</b>
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/s/ Robert W. George  
Robert W. George